

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION**

IN RE:

JSMITH CIVIL, LLC,

DEBTOR.

**CASE NO. 23-02734-5-JNC
CHAPTER 11**

**LIMITED OBJECTION AND RESPONSE IN OPPOSITION
TO BARNHILL CONTRACTING COMPANY'S
MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

NOW COMES the Debtor JSMITH CIVIL, LLC (the "Debtor"), by and through undersigned counsel, and hereby responds in opposition to Barnhill Contracting Company's Motion for Relief from the Automatic Stay [D.E. 157] (the "Barnhill Stay Motion" or "Stay Motion") filed by BARNHILL CONTRACTING COMPANY ("Barnhill"), and requests that any relief allowed by this Court be limited, conditioned, and circumscribed in the manner and upon the grounds set forth herein. In support hereof, and in limited opposition to the Stay Motion, the Debtor shows unto the Court as follows:

1. The Court has jurisdiction over this matter, and the relief requested therein, pursuant to 28 U.S.C. §§ 151, 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This Court, likewise, has the authority to hear this matter pursuant to the General Order of Reference entered by the United States District Court for the Eastern District of North Carolina on August 3, 1984.

2. The Debtor, a limited liability company organized and existing under the laws of the State of North Carolina, filed a voluntary petition seeking relief under chapter 11 of

the Bankruptcy Code on September 19, 2023 (the “Petition Date”), BK Case No. 23-02734-5-JNC (the “Bankruptcy Case”).

3. Prepetition, and on November 29, 2022, the Debtor commenced a civil action against Barnhill with the Wake County Superior Court captioned *JSmith Civil, LLC v. Barnhill Contracting Company, et al.*, File No. 22CV015003, relating to a construction project for which Barnhill served as general contractor and referred as, the “400H Project” (collectively, the “State Court Action”). A copy of the Register of Actions as of December 18, 2023, which is maintained by the Wake County Superior Court for the State Court Action, is attached hereto as **EXHIBIT 1** and incorporated herein by reference.¹

4. Barnhill, in the State Court Action, filed Barnhill Contracting Company’s Answer on March 1, 2023 (the “Barnhill Answer”), a copy of which is attached hereto as **EXHIBIT 3**. The Barnhill Answer, unexplainably, did not contain any counterclaims against the Debtor or assert, as an affirmative defense or otherwise, offset or setoff of any amounts purportedly owed by the Debtor to Barnhill and arising from the 400H Project or any other construction projects, including but not limited to, the Selma Burke Project or the NCCU Project, coined as the “Abandoned Projects” in the Stay Motion.

¹ A copy of the Complaint, filed by the Debtor and commencing the State Court Action, is attached hereto as **EXHIBIT 2** and incorporated herein by reference. The Standard Subcontract Document, attached to the Complaint in the State Court Action as Exhibit B and governing the contractual relationship between the Debtor and Barnhill and upon which the claims in the State Court Action are based, contains an arbitration provision, requiring—at the election of Barnhill—that any and all disputes arising in connection with the Subcontract be submitted to binding arbitration.

5. To date, and despite being pending for over a year, the State Court Action has not been stayed pending arbitration,² nor has any formal and non-administrative action been taken in furtherance of any arbitration proceeding by the Debtor or Barnhill.

6. Barnhill, post-petition and in the Bankruptcy Case, filed the Stay Motion currently before the Court, seeking relief from the automatic stay “to allow Barnhill to assert counterclaims in a pending arbitration proceeding involving the Debtor and Barnhill in order to liquidate[] Barnhill’s claims against the Debtor.” Barnhill Contracting Co.’s Motion for Relief from the Automatic Stay [D.E. 157], at p. 1.

7. Courts in the Fourth Circuit, when determining whether “relief from stay to commence or continue litigation in another forum is appropriate . . . must balance potential prejudice to the bankruptcy debtor’s estate against the hardships that will be incurred by the person seeking relief from the automatic stay.” In re Wolsonovich, 2020 Bankr. LEXIS 1118, at *5 (Bankr D.S.C. April 1, 2020).

8. The Debtor, in order to prevent prejudice to the bankruptcy estate and its creditors, objects to the Stay Motion on the following limited bases:

- A. Barnhill should not be granted relief from the automatic stay to assert counterclaims and defenses in any arbitration proceeding or otherwise that it previously waived by failing to assert, maintain, and prosecute, in the State Court Action;³

² The Trial Court Administrator for the 10th Judicial District, on December 13, 2023, sent a Wake County Civil Superior Court Case Management Notice (the “Case Management Notice”), a copy of which is attached hereto as **EXHIBIT 4** and incorporated herein by reference, which will prompt the issuance of a Trial Scheduling Notice setting a trial date for the State Court Action.

³ Barnhill, through the claims allowance process, can assert its claims against the Debtor

B. Barnhill should not be granted relief from the automatic stay to assert counterclaims against the Debtor, which it has not identified, described, and quantified; and

C. Barnhill should not, and cannot, be granted relief from the automatic stay to obtain—through a private arbitration proceeding—an arbitration award that if confirmed, would impose post-petition judgment liability against the Debtor, to the detriment of other similarly-situated general unsecured creditors.

9. Should this Court grant the relief requested by Barnhill in the Stay Motion, it should condition and limit said relief as follows: (a) Barnhill should be required to identify, describe, and quantify the underlying allegations, amounts, and other information supporting any such counterclaims or affirmative defenses that it intends to assert against the Debtor; (b) Barnhill should be prohibited from asserting counterclaims and defenses that it previously waived; and (c) The Debtor shall not have any post-petition judgment liability arising from any claim, counterclaim, or affirmative defense asserted by Barnhill, in the State Court Action or otherwise, all of which arose prior to the Petition Date. The foregoing conditions and limitations prevent and mitigate any prejudice to the Debtor, the bankruptcy estate, and creditors that will be sustained as a result of granting the relief sought by Barnhill in the Stay Motion.

WHEREFORE, and based upon foregoing, as well as any additional argument or evidence that may be raised in connection with any hearing on the Stay Motion,⁴ the Debtor

arising from the Selma Burke Project and the NCCU Project, without the necessity of obtaining relief from the automatic stay to file purported counterclaims and assert setoff and offset defenses, aimed at preventing and diluting any recovery by the Debtor against Barnhill in the State Court Action.

⁴ The Debtor, in connection herewith, respectfully requests a hearing on the Stay Motion

respectfully requests that the Stay Motion be **DENIED** and such further relief as the Court deems necessary and proper.

Respectfully submitted this, the 18th day of December, 2023.

**BUCKMILLER, BOYETTE & FROST,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a true and accurate copy of the foregoing **LIMITED OBJECTION AND RESPONSE IN OPPOSITION TO BARNHILL CONTRACTING COMPANY'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY** was electronically filed with the CM/ECF system, notification of which was remitted to the following CM/ECF participants:

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The undersigned further certifies that a true and accurate copy of the foregoing was deposited with the United States Postal Service in an envelope, bearing sufficient postage for mailing via first-class mail delivery, properly addressed as follows:

JSmith Civil
Post Office Box 857
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Debtor-in-Possession

Executed this, the 18th day of December, 2023.

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